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SUPREME COURT, U.S.

Case No. 81-5046

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1980

MACK C. RUFFIN, JR.,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

# BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

JIM SMITH
ATTORNEY GENERAL
STATE OF FLORIDA

CHARLES CORCES, JR.
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

Counsel for Respondent

## QUESTIONS PRESENTED

I.

WHETHER A DEATH SENTENCE, WHICH IS BASED IN PART UPON THE AGGRAVATING CIRCUMSTANCE THAT THE CAPITAL CRIME OCCURRED WHILE THE DEFENDANT WAS ENGAGED IN A KIDNAPPING AND ROBBERY, CAN PASS DUE PROCESS AND CRUEL AND UNUSUAL PUNISHMENT PROHIBITION STANDARDS, WHEN THE KIDNAPPING AND ROBBERY OFFENSES WERE NOT CHARGED AND THE JURY WHICH CONSIDERED THE AGGRAVATING CIRCUMSTANCES AND RECOMMENDED THE DEATH SENTENCE RECEIVED NO INSTRUCTIONS ON THE ELEMENTS OF ROBBERY AND KIDNAPPING?

II.

WHETHER A CRIME OCCURRING DURING THE SAME CRIMINAL EPISODE AS A CAPITAL CRIME, AND ONLY A FEW HOURS AFTER THAT CAPITAL OFFENSE, CAN NEGATE THE MITIGATING CIRCUMSTANCE OF NO PRIOR HISTORY OF CRIMINAL ACTIVITY PROVIDED FOR BY FLORIDA'S DEATH PENALTY STATUTE WITHOUT OFFENDING THE PRINCIPLES OF DUE PROCESS AND SUBJECTING THE CAPITAL DEFENDANT TO CRUEL AND UNUSUAL PUNISHMENT?

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## OPINIONS BELOW

The opinion of the Supreme Court of Florida is reported at 397 So.2d 277 and correctly appears in Appendix A of the Petition for Writ of Certiorari.

## JURISDICTIONAL STATEMENT

Respondent does not question the jurisdictional statement as stated in the Petition for Writ of Certiorari.

## STATEMENT OF THE CASE

Respondent accepts petitioner's statement of the case.

## REASONS FOR DENYING WRIT

### As to Issue I

### ISSUE I.

WHETHER A DEATH SENTENCE, WHICH IS BASED IN PART UPON THE AGGRAVATING CIRCUMSTANCE THAT THE CAPITAL CRIME OCCURRED WHILE THE DEFENDANT WAS ENGAGED IN A KIDNAPPING AND ROBBERY, CAN PASS DUE PROCESS AND CRUEL AND UNUSUAL PUNISHMENT PROHIBITION STANDARDS, WHEN THE KIDNAPPING AND ROBBERY OFFENSES WERE NOT CHARGED AND THE JURY WHICH CONSIDERED THE AGGRAVATING CIRCUMSTANCES AND RECOMMENDED THE DEATH SENTENCE RECEIVED NO INSTRUCTIONS ON THE ELEMENTS OF ROBBERY AND KIDNAPPING?

In Florida, one of the aggravating circumstances that may be considered by the sentencer is whether

> "The capital felony was committed while the defendant was engaged or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping or aircraft piracy or the unlawful throwing, placing or discharging of a destructive device or bomb." Fla.Stat. 921.141(5)(d) (1977)

Essentially, petitioner argues that the sentencing authority may not find this aggravating circumstance to exist unless the defendant is formally charged and convicted of the underlying felony. The Florida Supreme Court held in petitioner's case otherwise. It said:

> "It is not necessary that Ruffin be charged and convicted of the robbery and the kidnapping that led to the murder of Mrs. Hurst. The State proved beyond a reasonable doubt that concomitant with the murder Ruffin also committed the robbery and the kidnapping."
>
> (Petitioner's A1 p.8)

Relying on Presnell v. Georgia, 439 U.S. 14 (1978), Petitioner contends that he was denied due process of law and is being subjected to cruel and unusual punishment because he was not formally charged and convicted of the underlying felony constituting the aggravating circumstances found in Florida Statutes 921.141(5)(d).

His reliance on Presnell is misplaced. In Presnell the Court held that due process did not allow an appellate court to sustain a sentence of death based on an aggravating circumstance which was neither considered nor found to have existed by the sentencing authority.

In Presnell, Presnell had been found guilty of murder and the jury, in its determination of whether to impose the sentence of death, was instructed that one of the aggravating circumstances they could consider was whether the murder had been committed while Presnell was engaged in the commission of kidnapping with bodily harm; aggravated sodomy. The jury found this aggravating

circumstance to exist (which apparently was the only one under the murder charge). However, the Georgia Supreme Court held that the state could not rely upon sodomy as constituting the bodily injury associated with the kidnapping. Nonetheless, it held that there was sufficient evidence of forcible rape and this sufficed to constitute the bodily injury associated with the kidnapping. The problem was that the jury was never asked to consider, nor did it find forcible rape as the underlying felony associated with the kidnapping. Consequently, the Georgia Supreme Court made a finding not made by the sentencing authority, i.e., the jury.

That was not the situation in the instant case. Unlike in Georgia, the judge is the sentencing authority under Florida's death penalty statute. Lamadline v. State, 303 So.2d 17 (Fla.1974). The judge, as the sentencer in the instant case, was the one that made the finding that the murder was committed during the perpetration of a robbery and kidnapping - and he did so based on evidence establishing this beyond a reasonable doubt.

As to Issue II

ISSUE II.

WHETHER A CRIME OCCURRING DURING THE SAME CRIMINAL EPISODE AS A CAPITAL CRIME, AND ONLY A FEW HOURS AFTER THAT CAPITAL OFFENSE, CAN NEGATE THE MITIGATING CIRCUMSTANCE OF NO PRIOR HISTORY OF CRIMINAL ACTIVITY PROVIDED FOR BY FLORIDA'S DEATH PENALTY STATUTE WITHOUT OFFENDING THE PRINCIPLES OF DUE PROCESS AND SUBJECTING THE CAPITAL DEFENDANT TO CRUEL AND UNUSUAL PUNISHMENT?

As a mitigating circumstance under Florida Statutes 921.141(6)(a) the sentencing authority may consider whether:

(a) The defendant has no significant history of a prior criminal activity.

The sentencing authority in the instant case did not find that mitigating circumstance to exist. Petitioner argued below as he does here that it was improper for the sentencing authority to consider the murder of Deputy Coburn as negating the absence of significant prior criminal history. The Supreme Court of Florida held that prior means prior to sentencing. Consequently, even though the deputy's murder occurred in point of time after the murder of Mrs. Hurst, it could be considered by the sentencing authority in its determination as to whether at the time of sentencing petitioner had any significant prior history of criminal activity.

Petitioner is asking the Court to grant certiorari and hold that this is constitutionally unfair. He wants this Court to say that it matters not how many other murders he may have committed the same day, the sentencing authority cannot take those murders into consideration in making its determination as to whether or not petitioner had a significant history of prior criminal activity. Given the fact that Florida law is for Florida to interpret, Gardner v. Louisiana, 368 U.S. 157 (1961), he fails to explain how that interpretation denies him due process or subjects him to cruel and unusual punishment, except to make a specious comparison with Godfrey v. Georgia, 446 U.S.420 (1980).

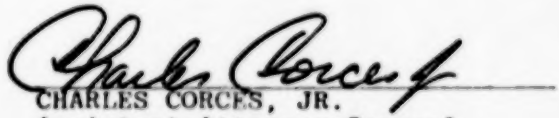
In Godfrey, the Court simply held that where the sole aggravating circumstance involves the quality or character of the homicide, the definition of the elements of that aggravating factor must set it apart from the norm or usual murder case; otherwise it violates the Eighth Amendment because, if not, any homicide would automatically qualify as a death case. There is no conflict between Godfrey and the holding of the Supreme Court of Florida in the instant case.

## CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL



CHARLES CORCES, JR.
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

Counsel for Respondent

## CERTIFICATE OF SERVICE

I, CHARLES CORCES, JR., a member of the Bar of the Supreme Court of the United States and counsel of record for the State of Florida, Respondent herein, hereby certify that on July 22 , 1981, pursuant to Rule 33, Rules of the Supreme Court of the United State, I served three copies of the foregoing Brief of Respondent in Opposition to Petition for Writ of Certiorari on Jerry Hill, Public Defender, counsel for petitioner herein, by depositing such copies in the United States Post Office, Tampa, Florida, with first class postage prepaid, properly addressed to 495 N. Carpenter Street, Hall of Justice Annex, Bartow, Florida 33830.

All parties required to be served have been served.

Of Counsel for Respondent